Bail Slip:

That the Appellants/Accused Viz., 1.Mani and 2.Chinnaval @ Pachaiyammal were directed to be released on bail as per the order of this Court dated 27.12.2004 and made in Crl.MP.No.11742/2004 in Crl.A.No.1356/04

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:04.11.2006

CORAM

THE HON'BLE MR.JUSTICE R.BALASUBRAMANIAN
&
THE HON'BLE MR.JUSTICE S.TAMILVANAN

CRL.APP.NO.1356 OF 2004

1.Mani
2.Chinnaval @ Pachaiyammal ..Appellants/Accused No. 1 & 2

Vs.

State represented by
Inspector of Police
Nagarasampatti Police Station
Pochampalli Taluk
Dharmapuri District
Crime No.158/2001 ..Respondent/Complainant

Prayer: Criminal appeal u/s 374 & 386 of Crl.PC against the judgment dated 28.10.2004 passed by the learned First Additional District & Sessions Judge, Dharmapuri District at Krishnagiri in S.C.No.205/2003.

For Appellants : Mr.Abudu Kumar Rajarathinam

For Respondent : Mr.C.T.Selvam, APP

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JUDGMENT

(Judgment of the court was delivered by
Justice R.Balasubramanian)

Three persons were tried in S.C.No.205/2003 on the file of the First Additional Court of Sessions, Dharmapuri at Krishnagiri under section 302 read with section 34 I.P.C. At the end of the trial, the learned trial Judge acquitted A3 but found A1 and A2 alone guilty under that section and sentenced each one of them to undergo imprisonment for life together with a fine of Rs.1,000/-, carrying a default sentence. Hence the convicted accused are before this court in this appeal. Heard Mr.Abudu Kumar Rajarathinam learned counsel appearing for the appellants and Mr.C.T.Selvam learned Additional Public Prosecutor appearing for the State.

2. The occurrence had taken place at 8.00 p.m on 12.04.2001 and as per the charge, after pushing down Durai (since deceased) to the ground, A1, sitting on the lower abdomen of Durai, hit on his chest and cheek with a stone; A2, with a stone, hit on Durai's chest, cheek and shoulder and A3, with a stick, attacked on his cheek and hands resulting in his death. A2 is the wife of A1. A3 is the elder sister of A2. Durai (since deceased) and P.W.2 are the brothers of A2 and A3. To prove their case, the prosecution examined P.Ws.1 to 11, besides marking Exs.P.1 to P.15 and M.Os.1 to 5. The defence neither examined any witnesses nor produced any documentary evidence. P.W.1 would state that there is a panchayat office close to the temple; in that panchayat office, there is a television; he was proceeding to the panchayat office to watch television at about 8.30 p.m on 12.04.2001; he heard a commotion behind the temple; therefore he went towards that side, where, he found Durai (since deceased) lying on the ground; he also found A1 sitting on Durai's chest and causing injury on his chest with a stone. He would also state that he found A1 causing injuries on the shoulders of Durai as well; A3 attacked with a stick on the back side head of Durai; A2 attacked on the chest and throat of Durai with a stone; P.Ws.1, 2, 3 and others went to separate them; a lady by name Kalyani obstructed the witnesses from separating the people; wriggling out of their clutches, when P.W.1 and others went and lifted Durai, A1 and A2 made good their escape; Durai was made to stand and he was bleeding through his mouth; on seeing blood, P.W.1 apprehended that something serious is happening; Durai was unconscious; therefore he was not knowing what is happening to him.; 200 feet away, a medical compounder by name Vedachalam (P.W.4) was having his house; P.Ws.1, 2, 3 and others took Durai to his house; from P.W.4's house, Durai was taken to his house; leaving him there, P.W.1 left and the following morning, P.W.1's

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nephew told him that Durai had already died. P.W.1 went to the Village Administrative Officer at 6.30 a.m on 13.04.2001 and informed him that Durai should have died only on account of the assault perpetrated on him by the accused. Ex.P.1 is the said complaint, which was reduced into writing by the Village Administrative Officer. P.W.8 is the Village Administrative Officer. At 6.30 a.m on 13.04.2001, P.W.1 appeared before him and told him as to what he saw at 8.00 p.m on 12.04.2001 (during which time A1 to A3 attacked Durai). P.W.1 also told P.W.8 that Durai died at 6.00 a.m on 13.04.2001. P.W.8 reduced into writing the said complaint, in which, P.W.1 had signed. P.W.8 went and observed the dead body. Then, P.W.8 and P.W.1 went to the Investigating Police Station at 8.30 a.m., where, the complaint was handed over.

3. P.W.10 is the Sub-Inspector of Police. At 8.30 a.m on 13.04.2001, P.Ws.8 and 1 appeared before him and gave a written complaint, which he registered as Ex.P.1 in his police station Crime No.158/2001 under section 302 I.P.C. Ex.P.12 is the printed first information report. He sent the express records to the court as well as to the higher officials. P.W.11 is the Investigating Officer. Over wireless, he received the information at 8.30 a.m on 13.04.2001 from P.W.10 about the crime. He reached the police station at 9.30 a.m and collected the express records. He then proceeded to the scene of occurrence at 9.45 a.m and in the presence of P.W.5 and another, he prepared Ex.P.2, the observation mahazar and Ex.P.9, the rough sketch. P.W.5 witnessed the preparation of Ex.P.2, the observation mahazar. Through a Photographer, P.W.11 got the crime scene photographed. Exs.P.14 and 15 are the photographs and negatives. From 10.30 a.m till 1.30 p.m on that day, P.W.11 conducted inquest over the dead body in the presence of panchayatdars and witnesses. Ex.P.16 is the inquest report. He sent the dead body through a constable along with a requisition to the Government Hospital at Kaveripattinam for conducting post mortem.

4. P.W.9 is the constable who accompanied the dead body with the requisition to the hospital for post mortem. After post mortem, he removed M.Os.4 and 5 from the dead body and handed over the same to the Investigating Officer along with his special report (Ex.P.11). P.W.6 is the Doctor, who, on receipt of Ex.P.3 (requisition) and the dead body, commenced post mortem on the dead body at 4.00 a.m on 13.04.2001. He found various symptoms on the dead body as noted by him in Ex.P.6, the post mortem report. The following are the symptoms noted by him in Ex.P.6:

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"External Injuries:

1) Bitten wound 2.5 c.m x 2 cm over the left cheek.
2) 2" length horozontal lacerated wound left cheek below eye.
3) Blackish contusion 3" x 3" over the middle of the forehead.
4) Diffuse contusion skin colour over the right side full chest.
5) 2" x 1" abrasion over right shoulder.
6) 1" x 1" abrasion over the front of the neck.
7) Blackish contusion 10 cm x 5 cm over the left shoulder left side neck.
8) Blackish contusion of 2" breadth over the left loin left side abdomen.
9) Blackish diffuse contusion over the right side chest.

Internal Examination:

Abdomen: Opened. Collection of blood. Hyoid - intact. Thorax - opened. Blackish contusion. Blood collected on the right side 3rd rib muscle contused. No fracture. Sub-pleural collection of right side. Lungs - Right 450 gms. Left 500 gms. Purple colour congested. Heart - 120 gms. Chambers full of blood. Liver - 1300 gms. Right inferior lobe contused. Capsule torn. Spleen - 150 gms. Kidney - Right 90 gms. Left - 80 gms. Contused. Stomach content of bluish colour fluid with small particle. Small intestines - Empty. Skull - No fracture. Brain - 1200 gms. Bladder - Empty."

The Doctor opined that death would have occurred 10 to 12 hours prior to autopsy as a result of shock due to injury to vital organs and due to external injuries to chest. Ex.P.5 is the report on the viscera, which shows that no poison was detected in the stomach and contents and intestine and contents. Ex.P.4 is the report on the hyoid bone, which shows that the hyoid bone was intact.

5. P.W.4 is a compounder by profession. On the occurrence day night, P.Ws.2 and 3 brought Durai before him. P.W.4 noticed injuries on the fore head, cheek and left side chest of Durai. Durai complained that on account of the injuries to his chest, he finds it difficult to breathe. P.W.4 gave metisol injection. He gave that injection because, Durai complained that he was finding it difficult to breathe. P.W.4 advised Durai to be taken for a better treatment and accordingly, Durai was taken. Next day

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morning, he came to know that Durai died. P.Ws.2 and 3 had given evidence regarding the occurrence proper more or less on the same lines as spoken to by P.W.1. Of course, there is a variation in the role attributed to A2, about which we will refer later on in this judgment.

6. P.W.11 sent a requisition to the court to subject the viscera for chemical examination. P.W.7 is the Magisterial Clerk, who speaks about the receipt of Ex.P.7 (requisition) to subject the viscera for chemical examination. As an enclosure to Ex.P.8 (court's letter), the viscera was sent to the laboratory. P.W.11 examined further witnesses by recording their statements. After completing all the legal formalities, he filed the final report in court against the accused on 24.10.2001 under section 302 read with section 34 I.P.C. When the accused were questioned under section 313 of the Code of Criminal Procedure on the basis of the incriminating materials made available against them, they denied each and every circumstance put up against them as false and contrary to facts. As noted earlier, neither oral nor documentary evidence was brought before court at their instance.

7. Mr.Abudu Kumar Rajarathinam learned counsel appearing for the appellant would contend that the evidence of P.Ws.1 to 3 is so very artificial that it cannot be believed. The very fact that P.Ws.1 to 3 did not take any steps at all in preventing the assault on Durai (P.W.2 is the elder brother to Durai and P.W.3 is P.W.2's wife), would itself show that they would not have been present at the crime scene. There is no reason at all as to why P.W.2, who is the blood brother to the victim, had not chosen to give a complaint. But instead, P.W.1, who had been tried in a case for murder, though acquitted, is shown to have given the complaint. There is no reason at all as to why P.W.1 should give the complaint. Therefore the argument is that, there is some suspicion in the lodging of the complaint itself and this will enable us to disbelieve the evidence of P.Ws.1 to 3. Even assuming that the evidence of P.Ws.1 to 3 deserve acceptance, even then, their evidence show (particularly P.W.3) that there was a quarrel between the deceased on the one hand and A3 on the other hand initially and later on, A1 and A2 jointly. Therefore Exception 4 to section 300 I.P.C would stand attracted. Even then, the conviction cannot be under section 302 I.P.C or under section 304-II I.P.C, since the accused are not shown to have used any deadly weapon in causing the injuries on the victim. Injury to the liver, which appears to be the real cause for death, as per the Doctor who did post mortem, is possible when a man sits on the abdomen of another person and forcibly punches the chest. In this case, A1 is shown to have been sitting on the lower abdomen of the victim. Therefore injury to the liver is not shown to have been caused with any deadly weapon much less the stones shown to have been in

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the hands of A1 and A2. Whether A2 caused injuries with stones on the victim or she attacked the victim with a stick, there is inconsistency. Therefore, having an overall view of the above facts, this court may consider acquitting A2 by disbelieving the evidence of P.Ws.1 to 3 on that inconsistency and consider altering the conviction of A1 from one under section 302 I.P.C into one under section 325 I.P.C. We heard the learned Additional Public Prosecutor on the above points.

8. Let us examine the merits of the submissions made by the learned counsel on either side. Let us straight away go into the medical evidence. Of course medical evidence establishes beyond doubt that Durai did not die a natural death. Therefore it is clear that death is due to homicidal violence. P.W.6 is the Doctor who did post mortem on the dead body. We have already extracted the symptoms noted by the Doctor in the earlier portion of this judgment. Except injuries 4, 8 and 9, other injuries are on non-vital parts of the body. Injuries 4, 8 and 9 show that Durai suffered a contusion over the right side full chest; a contusion of two inches breadth over the left loin left side abdomen and a contusion over the right side chest. P.W.6 (Doctor) had noted in the post mortem report that there was a laceration in the lungs and laceration of tissues below the third right chest rib. There is a laceration on the upper part of the liver with a tissue tear. He had deposed that Durai had suffered shock as a result of the external injuries noted by him in his chest. Then he categorically affirmed that when a person is lying on his back and another person sits on his chest and repeatedly fists on the chest, there is a possibility of liver sustaining an injury and the tissue over the liver getting torn. From the oral evidence of witnesses, it is clear that A1 was found sitting on the chest of Durai and in that posture, using a stone, he caused certain injuries on the chest. P.W.6 in his evidence in chief had admitted that laceration in the liver would not cause death instantaneously but it would cause death in the ordinary course. He is very firm that for the lacerated injury found on the liver, there need not be any external injury. From the evidence of P.W.6, it is clear that death is due to laceration in the liver. The occurrence was around 9.00 p.m on 12.04.2001 and death was around 6.00 a.m, the following morning. Therefore, from the evidence of P.W.6, it is clear that injury to the liver alone had resulted in the death of Durai, though not instantaneously but after a few hours.

9. In the context of the medical evidence, we went through the evidence of P.Ws.1 to 3. All of them uniformly say that they noted A1, after pushing down Durai (since deceased) to the ground, sat on Durai's chest and caused certain injuries on his chest using a stone. There is no evidence to show that A1 or A2 attacked on the lower abdomen of Durai. Having regard to the material evidence of

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P.Ws.1 to 3 and in the absence of any material available in their evidence in cross indicating that they would not be eye witnesses to the crime or disclosing any material which would affect their evidence in chief, we see no reason at all as to why we must disbelieve P.Ws.1 to 3 as far as their evidence against A1 is concerned. Therefore we hold that the evidence of P.Ws.1 to 3 establish beyond doubt the involvement of A1 in sitting on the chest of Durai, who had already fallen to the ground and when he was lying on his back, A1 caused certain injuries on his chest. As far as A2 is concerned, who is none else than the wife of A1, P.W.3 in her evidence in cross would state that A2 attacked with a stick on Durai while the other witnesses say that A2 used a stone. The conviction of A1 and A2 is under section 302 read with section 34 I.P.C. A2 being by the side of her husband (A1) at the time when A1 attacked the victim, cannot be said to be with any sinister motive. Therefore going by the inconsistencies noted above in the role attributed to A2, we are inclined to hold that there is nothing on record to show that she had shared the common intention with her husband to murder Durai.

10. When we discuss the case of the prosecution against A1, we will reflect our mind whether A1 had any intention to kill the deceased or not? Suffice it to say at this stage that A2 would have had no chance at all to know that her husband is going to kill Durai. Admittedly, A1 is not shown to have used any lethal weapon. From the evidence of P.W.3, we find that the quarrel started from just near the house of Durai (since deceased) and it was taken to a distance of 50 feet near the temple where the ultimate act took place. We will reflect our mind on the quarrel when we consider the case of A1. If there was a quarrel, then, the presence of A2 along with her husband (A1) at the crime scene cannot be said to be with any motive. There is evidence to show that A3 was involved in the quarrel and then only A1 and A2 arrived. For all the reasons stated above, we have no doubt at all that A2 could not have shared any common intention with A1 in attacking Durai, who later on died. Therefore we are inclined to acquit A2 of the offence under section 302 read with section 34 I.P.C.

11. Coming to the conviction of A1, we find from the evidence of P.W.3 that a quarrel arose initially. We extract the relevant portion in her evidence in chief as hereunder:

> "At 8.00 p.m there was a quarrel near the house of Durai (since deceased); A1 used to assert his right to visit A3 as the person taking care of her and in that context there had been quarrel over a long number of days between the deceased and A1; the quarrel that occurred near Durai's house was taken to a distance of 50 feet upto Mariamman temple followed by P.W.3; in that

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quarrel, the deceased and A3 alone participated and near the Mariamman temple, A1 and A2 came."

Then, the occurrence as spoken to by the witnesses had taken place. P.W.2 had admitted in his evidence in cross that to his knowledge, A1 was having an affair with A3 for almost 10 years and that was known to Durai (since deceased). This resulted in a quarrel between A1 and A3 on the one hand and Durai (since deceased) on the other hand. But however, it was not taken to the notice of the police. Therefore the evidence of P.W.3 that there was a quarrel just prior to the occurrence stands probabilised by the evidence of P.W.2 also. It is therefore clear that A1 attacked Durai as spoken to by the prosecution witnesses only in the midst of an ongoing quarrel.

12. The question that still survives for consideration even after this conclusion is, for what offence A1 could be convicted? In this context, we also want to rule out the possibility of A2 (since acquitted by us) causing any injury on Durai because, the consistent evidence is that, A1, sitting on the chest of Durai, hit him with stones. There is no evidence to show that A1 at some point of time or the other moved away from the victim giving room for A2 to attack. We have already noticed that injuries 4, 8 and 9 are the relevant injuries namely, a contusion over the right side full chest (injury No.4); a contusion of two inches breadth over the left loin left side abdomen (injury No.8) and a contusion over the right side chest (injury No.9). Ribs are not fractured. However, the muscle under the third rib alone was found contused. We have already noticed that there is a laceration on the upper part of the liver. If we read the evidence of P.W.6, the Doctor, it can be easily seen that cause of death is due to the laceration caused to the liver. There is no evidence to show that A1 attacked any where in the lower abdomen of Durai since deceased). The consistent evidence is that, A1, sitting on the chest of Durai, hit him on his chest with stones. We have already referred to the evidence of P.W.6, the Doctor, who did post mortem. P.W.6 would state that if a person sits on the chest of a person and repeatedly hits on the chest, then, there is every possibility of the liver and the tissue surrounding the liver sustaining injuries. Therefore, from the totality of the materials available, it is clear that injury to the liver is not intended to be caused by the accused. But the said injury had occurred to the victim when A1 was sitting on the chest of the victim and hitting him on his chest repeatedly. Section 300 I.P.C contains four clauses. Under clause firstly, death must be caused with the intention of causing death. Under clause secondly, the act must be done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. Under clause thirdly, the act must be done with the intention of

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causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death and under clause fourthly, the act must be done by the person knowing that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death and commit such act without any excuse, etc.,..... In our considered opinion, from the evidence available on record, the requirement of section 300 I.P.C is not made out. It is impossible to attribute knowledge to A1 that while sitting on the chest if he hits on the chest of the victim either with hands or with stones, then the liver is likely to sustain injuries. However, Doctor's evidence is that injury to liver had endangered Durai's life. Such act is covered under clause eighthly of section 320 I.P.C namely, it is a grievous hurt. Since no weapon at all is shown to have been used in causing the injury to the liver, we have no doubt at all that the act of the A1 must come only under section 325 I.P.C and definitely not under section 302 I.P.C.

12. Accordingly, the appeal stands disposed of as hereunder:

> "The judgment under challenge convicting A2 under section 302 read with section 34 I.P.C is set aside and A2 is acquitted of the said offence. The fine amount, if any, paid by her for that conviction shall be refunded to her. The bail bond, if any, executed by her shall stand terminated. The judgment under challenge so far as it relates to the conviction of A1 under section 302 read with section 34 I.P.C is concerned, is set aside. Instead, he is found guilty under section 325 I.P.C. For the said conviction, on the facts available in this case, we are inclined to sentence him to undergo rigorous imprisonment for two years. The fine amount imposed on A1 for his conviction under section 302 read with section 34 I.P.C is sustained for his conviction under section 325 I.P.C. The Court of Sessions is directed to secure A1 and remand him to the prison to serve the remainder of the sentence".

Vsl

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The First Additional District & Sessions Judge,
Dharmapuri District at Krishnagiri
2.-Do-Through the Principal Sessions Judge, Krishnagiri
3.The Judicial Magistrate, Pochampalli
4.-Do-Through the Chief Judicial Magistrate, Dharmapuri
5.The District Collector, Dharmapuri
6.The Director General of Police, Chennai
7.The Public Prosecutor, High Court, Madras
8.The Superintendent, Central Prison, Vellore
9.The Inspector of Police, Nagarasampatti Police Station,
Pochampalli Taluk, Dharmapuri District

+ 1 cc to Mr. K. Thiruvenkadam, Advocate SR No. 52229

HPR(CO)
SR/17.11.2006 CRL.APP.NO.1356 OF 2004

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